No. 79-1991

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRED LOWENSCHUSS,

Petitioner,

vs.

C. G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

and

RACHEL C. CARPENTER and THE McINTOSH FOUNDATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Second Circuit erred in refusing to rule that the district court had abused its discretion in approving the settlement of this class action as fair and reasonable?

2. Whether the petitioner, the sole objector to the class action settlement, had in fact ever requested discovery concerning the negotiation of the settlement, and, if so, whether the Second Circuit erred in refusing to rule that the district court had abused its discretion in failing to order any such discovery?

3. Whether the Second Circuit abused its discretion in awarding double the costs of the appeal against petitioner?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition of Fred Lowenschuss for a writ of certiorari is submitted on behalf of the plaintiff class and the McIntosh Foundation (the "Foundation"), the designated class representative.

Mr. Lowenschuss seeks review of the decision of the United States Court of Appeals for the Second Circuit which (i) affirmed the district court's approval of the settlement of this 7½-year old class action and (ii) awarded double the costs of the appeal against him in accordance with Rule 38 of the Federal Rules of Appellate Procedure. The Second Circuit's opinion, reported at 613 F.2d 18, is included in the Appendix to the Petition at pages 15a-20a; the district court's opinion, reported at 82 F.R.D. 712, is included therein at pages 1a-10a.

Statement of the Case

This class action was brought on behalf of persons who tendered shares of common stock of The Great Atlantic and Pacific Tea Company ("A&P") in response to a tender offer made in February 1973 by Gulf & Western Industries, Inc. ("G&W"). Consummation of that tender offer had been enjoined on antitrust grounds by the federal courts. *Gulf & Western Indus., Inc.* v. *The Great Atl. & Pac. Tea Co.*, 356 F.Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973). The amended complaint in this action alleges that G&W, the primary defendant[1]: (i) breached the tender offer contract; and (ii) violated the federal securities laws (A36-59[2]).

The action was instituted on February 14, 1973 by Mr. Lowenschuss as trustee for his law firm's pension plan, which had tendered 2,000 shares of A&P stock in response to G&W's tender offer. On July 25, 1973, the district court certified the action as a class action but dismissed the action on the merits, holding that the injunction of the tender offer had made G&W's performance impossible. *Lowenschuss* v. *Kane*, 367 F. Supp. 911 (S.D.N.Y. 1973).

On May 27, 1975, the Second Circuit reversed the dismissal of the complaint, 520 F.2d 255 (2d Cir. 1975), ruling that G&W would not have a defense of impossibility if G&W had been responsible for the circumstances which had rendered its performance impossible. The court made other significant determinations concerning the contract and se-

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[1] The amended complaint also names as defendants G&W's Chairman and Chief Executive Officer, C. G. Bluhdorn, and the dealer-manager of the tender offer, Kidder Peabody & Co., Incorporated.

[2] References in this form are to the Joint Appendix filed with the Second Circuit, a copy of which has been lodged by petitioner with the Clerk of this Court.

curities law claims, and indicated the measure of damages that might be applied should those claims be established. *Id.* at 264-69.

Mr. Lowenschuss was originally both the class representative and class counsel, but resigned as class counsel on April 20, 1976 after the Third Circuit had severely questioned the propriety of such a dual role. *Kramer* v. *Scientific Control Corp.*, 534 F.2d 1085, 1090 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976). Arnold Levin, Esq., Lowenschuss's counsel, was thereafter designated co-class counsel. *Lowenschuss* v. *Bluhdorn*, 72 F.R.D. 498 (S.D.N.Y. 1976). On April 20, 1978, Mr. Lowenschuss was disqualified as class representative when the district court found that his "preoccupation with assuring a large attorney's fee" had evinced a conflict of interest with the class and had defeated an effort to reach a favorable settlement. *Lowenschuss* v. *Bluhdorn*, 78 F.R.D. 675, 678 (S.D.N.Y. 1978).[3] On September 14, 1978, the Foundation, which had tendered the second largest number of shares (200,000), was appointed as class representative in Mr. Lowenschuss's place (A828).

The approved settlement agreement was executed in July 1978 by defendants and various representatives of the class (A787-806). Under the terms of that agreement, G&W will pay 94¢ for each of the approximately 1,130,000 shares for which claims have been submitted and will contribute an additional $150,000 toward counsel fees—for a total payment in excess of $1,200,000. The representatives of the class who negotiated this settlement included Mr. Lowenschuss's own counsel, as well as present co-class counsel.

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[3] Mr. Lowenschuss has been less than candid in trying to make it appear that his disqualification did not result from his own wrongful conduct. (Petition at 12-14 n. 16). As the district court recently stated in denying Mr. Lowenschuss any counsel fees, "his actions have been inconsistent with his obligations as fiduciary for the class." *Lowenschuss* v. *Bluhdorn*, 73 Civ. 2021 (S.D.N.Y., Mar. 20, 1980).

The settlement received the support of more than 550 class members who have submitted proofs of claim enabling them to participate in the settlement fund (A928). At the hearing to determine the fairness of the proposed settlement, the only objector was Mr. Lowenschuss. In short, with the exception of Mr. Lowenschuss, the settlement has received the unanimous approval of the class and all lawyers and parties who have ever represented it.

The settlement was approved on June 18, 1979 by Judge Dudley B. Bonsal, who had been extensively involved in the litigation for over three years and who concluded:

> "Given the substantial litigation risks, the uncertainty in the amount of damages and counsel's own estimate of the evidence, this Court cannot say that the likelihood of establishing liability and the consequent probable reward in damages would be substantially more than the amount offered in the settlement."

Lowenschuss v. *Bluhdorn,* 82 F.R.D. 712, 716 (S.D.N.Y. 1979).

Mr. Lowenschuss appealed both the approval of the settlement and various interlocutory orders. On January 9, 1980, the Second Circuit denied the appeal in all respects and specifically declared that the settlement will "enable class members to recover as much as they could reasonably have expected after a trial." 613 F.2d at 19. The court also awarded double the costs of the appeal against Mr. Lowenschuss, pursuant to Rule 38 of the Federal Rules of Appellate Procedure,[4] and requested the Pennsylvania Bar Association to review Mr. Lowenschuss' conduct in this case

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[4] Rule 38 provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

and to take appropriate action. *Id.* at 21. On March 20, 1980, the Second Circuit denied Mr. Lowenschuss's petition for rehearing in which he argued, among other things, that the award of double costs had been improper.

Mr. Lowenschuss has made three arguments in his petition:

1) affirmance of the approval of the settlement was improper because, in assessing the likelihood of success on the merits and the likely damages, both the district court and the Second Circuit misinterpreted the applicable New York substantive law (Petition at 26-36);

2) affirmance of the approval of the settlement was improper because the district court allegedly refused to grant Mr. Lowenschuss discovery concerning the negotiations of the settlement (Petition at 36-38);

3) awarding double the costs of the appeal was improper (Petition at 19-26).

ARGUMENT

Summary of Argument

The arguments proffered by Mr. Lowenschuss are clearly without merit and none of the issues which he has raised are even remotely appropriate for this Court's review. These issues are inextricably bound with the complicated procedural history of this action and the peculiar facts of the case. Mr. Lowenschuss points to no conflicts between the Second Circuit's opinion and decisions of other circuit courts, and none exist. Nor does he suggest any reason why this Court should exercise review beyond a purely conclusory request for the exercise of this Court's supervisory

powers. Moreover, the issuance of the requested writ would further delay the receipt of funds for which the plaintiff class has already waited 7½ years.

I.

The Issue of Whether the District Court Abused Its Discretion in Approving the Settlement Is Inappropriate for Review by This Court.

Mr. Lowenschuss argues that the Second Circuit's judgment approving the settlement was erroneous (Petition at 26-36). As the Court of Appeals recognized, however, the issue on appeal was whether the district court had abused its discretion in approving the settlement as fair and reasonable. 613 F.2d at 19, *citing City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) and *Newman* v. *Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 1973). Mr. Lowenschuss fails to provide any reason why this question merits review by this Court or has any significance beyond the particular facts of this case.

Mr. Lowenschuss attempts to transform the issues of judicial fact-finding and judicial discretion faced below into pure legal questions by claiming that the district court, in determining that the settlement was fair, misapprehended the substantive law (concededly the common law of the State of New York) that would have applied to the class's contract claims had they been litigated (Petition at 27). The fact that no questions of federal law are even raised in this regard dictates denial of the petition.

In any event, in determining the likelihood of success on the merits and the measure of damages, the district court properly considered the law which would be applied if the action were litigated on the merits. The Second Circuit, in its earlier decision reversing the dismissal of the complaint,

had indicated various elements of the liability and damage standards that would apply. The district court properly concluded that the legal standards that would have governed the class's claims almost certainly would have been those previously set down in the Second Circuit's earlier decision. In affirming the approval of the settlement, the Second Circuit indicated that the district court had correctly interpreted its earlier decision. *See* 613 F.2d at 19-20.

The purpose of a settlement is to avoid further litigation. Mr. Lowenschuss should not be allowed to litigate in this Court the substantive merits of a settled action, involving only questions of New York law.

II.

The Issue of Whether the District Court Abused Its Discretion in Allegedly Denying Discovery Into the Negotiation Process Is Inappropriate for Review by This Court.

Mr. Lowenschuss argues that the Second Circuit's decision should be reversed because the district court erred by allegedly denying him discovery at the settlement hearing concerning the integrity of the settlement process (Petition at 36-38). He relies on the recent decision in *In re General Motors Corporation Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir.), *cert. denied,* 444 U.S. 870 (1979), which held that, on the facts of that case, it was an abuse of discretion for the district court to deny objectors to the settlement an opportunity to inquire into the nature of the settlement negotiations.

The fatal shortcoming of Mr. Lowenschuss's argument is that he never requested discovery into the integrity of the negotiating process. Nowhere in his lengthy submissions

to the district court[5] did he ask for such discovery. His only request was to examine certain participants in the process concerning their reasons for supporting the settlement (A1490-92). That question had already been fully briefed and argued. Mr. Lowenschuss's argument was so clearly without a factual basis that the Second Circuit did not consider it necessary to address the argument in its opinion.

Furthermore, even under the authority relied upon by Mr. Lowenschuss, there is no absolute right of discovery. The *General Motors* case indicated that the question of discovery is addressed to the discretion of the district court based on all the facts before it. *See* 594 F.2d at 1133.[6] That question is not appropriate for review here.

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[5] Mr. Lowenschuss's opposition to the settlement was set forth in 71 pages of written submissions (A848-919) and in oral argument at the settlement hearing which filled 53 pages of transcript (A1479-81, A1486-96, A1498-1522, A1548-51, A1564-69, A1580-81, A1612-14).

[6] Mr. Lowenschuss's argument that the class was not adequately represented during the settlement discussions is wholly without merit. At all times during the negotiations of the settlement, the class was vigorously represented. The settlement negotiations were conducted with the knowledge and approval of the magistrate and the class's interests were represented by counsel. As the Second Circuit held:

> "Mr. Lowenschuss' efforts to imply that the settlement negotiations were marked by conflicts of interest are unsupported. They represent the culmination of a pattern of highly improper conduct on his part in making baseless and unjustified personal and professional attacks upon numerous reputable persons involved in the case, including counsel for various parties and district judges." 613 F.2d at 20.

III.

The Issue of Whether the Second Circuit Abused Its Discretion in Awarding Double Costs Is Inappropriate for Review by This Court.

Mr. Lowenschuss's challenge to the award of double costs is also without merit and inappropriate for this Court's review.[7] Rule 38 of the Federal Rules of Appellate Procedure clearly enables an appellate court, in its discretion, to award double costs in the case of a frivolous appeal. *Advisory Committee Note to Fed. R. App. P. 38* ("damages are awarded by the court in its discretion . . . as a matter of justice to the appellee and as a penalty against the appellant"); *see Oscar Gruss & Son* v. *Lumbermens Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1972). *See also* 28 U.S.C. §1912 (providing that the Supreme Court or a court of appeals may "in its discretion" adjudge double costs to the prevailing party as damages for delay).

When the Second Circuit determined that Mr. Lowenschuss's claims were frivolous, it had been able to consider the parties' briefs, a 1619-page Joint Appendix, a voluminous district court record,[8] and the oral arguments of counsel. It was in a position to evaluate the merits of Mr. Lowenschuss's claims in the context of the history of this case.

Mr. Lowenschuss's argument (Petition at 19) that the Court of Appeals made no specific determination that his appeal was "frivolous" is specious. Such a finding is implicit in the court's treatment of the issues raised on

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[7] In any case, his contentions in this regard do not affect the decision of the courts below approving the settlement as fair and adequate.

[8] The district court docket sheet runs 17 pages, with 343 entries (A1-17).

appeal, as well as in the very decision to award double costs. Similarly without merit is the suggestion (Petition at 17, 22-24) that the double costs award was improper because no request for double costs had been made. An appellate court can award double costs either on the motion of a party or *sua sponte*. *E.g., Overmyer* v. *Fidelity & Deposit Co.*, 554 F.2d 539 (2d Cir. 1977); *Simon & Flynn, Inc.* v. *Time, Inc.*, 513 F.2d 832 (2d Cir. 1975); *see* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* §3984.

Mr. Lowenschuss further argues that the Second Circuit's decision assessing double costs violated his due process rights because he was not given a special hearing on the double costs question. Rule 38 does not require a hearing, however, and courts which have awarded double costs have not required one as a prerequisite. Mr. Lowenschuss cites no cases that have required a special hearing before the imposition of costs under Rule 38.

Even if it is assumed that due process considerations apply to the awarding of double costs,[9] the procedural safeguards afforded Mr. Lowenschuss in this case were sufficient. As an experienced, practicing attorney, Mr. Lowenschuss must be deemed to be on notice of the sanctions provided in Rule 38. The appellate briefs and oral argument gave him ample opportunity to demonstrate that his claims were not frivolous. In addition, he was given an opportunity to be heard on the propriety of the imposition of double costs when, prior to the issuance of the Second Circuit's mandate, he argued this issue at

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[9] While this Court has recently suggested that due process considerations might apply to the imposition of attorneys fees against attorneys who litigate in bad faith, *Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836, 4840 (June 23, 1980), the Court also indicated that the due process concerns in such a case are less than in cases involving more substantial sanctions. *Id.* at 4840 n. 14.

length in his petition for rehearing. Due process could not require any more than Mr. Lowenschuss in fact received. To require a special Rule 38 hearing would further complicate and delay the appellate proceedings and would contravene the purpose of Rule 38—the assessment of damages for delay in the case of frivolous appeals.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: July 17, 1980

Respectfully submitted,

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